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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JAN 17 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

TELEPHONE COMPANY-)

CABLE TELEVISION)

Cross-Ownership Rules,)

Sections 63.54-63.58)

and)

Amendments of Parts 32, 36,)

61, 64, and 69 of the)

Commission's Rules to)

Establish and Implement)

Regulatory Procedures for)

Video Dialtone Service)

CC Docket No. 87-266

RM-8221

To: The Commission

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REPLY COMMENTS OF VIACOM INTERNATIONAL INC.

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SUMMARY

Two issues raised by the Commission's channel capacity/channel sharing inquiry warrant particular attention if video dialtone ("VDT") is to develop as a true competitive force. Indeed, these are matters of increased urgency because the Common Carrier Bureau's now-expedited action on VDT applications means that newly approved systems could soon be underway.

As the Commission has only recently reiterated, the common carrier framework for video dialtone requires both a basic platform "available to multiple video programmers on a nondiscriminatory basis" and also "a means by which end-user subscribers can access any and all of the video programming offered." Viacom and other commenters have demonstrated, however, that open access for programmers to reach end users is not yet assured.

First, set-top boxes (or functionally equivalent elements of VDT networks) may be used to thwart the open, nondiscriminatory access required for truly competitive packages to emerge on each system. The FCC should thus:

- require that any technical specifications or parameters for set-top boxes (or functionally equivalent elements of VDT networks) necessary to reach consumers be made publicly available, and
- take any further regulatory steps necessary to ensure that neither technical nor economic obstacles are created around the set-top box (or its equivalent).

Second, certain "channel sharing" proposals -- adding nothing to further the efficient use of network capacity -- appear to interfere with the programmer's right to control and establish the terms and conditions for the licensing of its service. The appropriate framework for advancing the worthy goal of promoting efficient use of network capacity through channel sharing needs to encompass only three basic steps:

- a programmer's voluntary decision to license its service to several program packagers,
- the packagers' notice to VDT operators of their licensing rights, and
- the operator's delivery of the program material to subscribers.

In any event, the Commission should make clear that channel sharing may not be used by VDT operators or packagers as a guise to demand exclusivity or sublicensing rights, nor in any other manner that impinges on the right of the programmer to decide who may carry its product and on what terms.

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To: The Commission

REPLY COMMENTS OF VIACOM INTERNATIONAL INC.

Viacom International Inc. ("Viacom") hereby submits its reply to comments filed in connection with the Third Further Notice of Proposed Rulemaking in the above-captioned "video dialtone" ("VDT") proceeding.¹ Viacom continues to focus on two issues raised by the Commission's channel capacity/channel sharing inquiry, the urgency of which is only heightened by the agency's recent efforts to expedite licensing of new VDT service on terms consistent with its nondiscriminatory regulatory framework.

Comments submitted in the latest round of this proceeding support Viacom's call for further action on two

¹ Memorandum Opinion and Order and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, FCC 94-269 (released Nov. 7, 1994) ("Memorandum Opinion and Order" or "Third Further Notice").

matters that could, in fact, stymie the development of video dialtone as a real competitive force. First, Viacom and others have identified the need for attention to the potential for set-top boxes (or functionally equivalent elements of VDT networks) to thwart the open, nondiscriminatory access required for truly competitive multichannel packages to emerge on each system. Second, Viacom and others call upon the agency to make clear that "channel sharing" is simply a network management issue that need not -- and indeed must not -- affect a programmer's right to control and establish the terms and conditions for the licensing of its service.

Viacom's concerns emanate from the Commission's own two-pronged vision for creating video dialtone: (1) the promotion of "intermodal" competition by allowing VDT systems to compete against other multichannel video distributors; and (2) the promotion of "intramodal" competition among program providers on each VDT system. As a matter of law and policy, the FCC established VDT as a common carrier service to accomplish these objectives and thereby ensure that access would be open to all programmers under the same terms and conditions.

As the FCC recently reiterated in one of its recent VDT authorizations, the common carrier framework for video dialtone requires both a basic platform "available to

multiple video programmers on a nondiscriminatory basis" and also "a means by which end-user subscribers can access any and all of the video programming offered."² Viacom and other commenters have demonstrated that such open access to end users is not yet assured. These comments -- together with the Common Carrier Bureau's now-expedited action on pending VDT applications -- underscore the urgency of promptly setting effective ground rules if VDT systems are to be designed in a manner consistent with the Commission's pro-competitive vision.³

² In re Applications of Ameritech Operating Companies, File Nos. W-P-C-6926, W-P-C-6927, W-P-C-6928, W-P-C-6929, W-P-C-6930, FCC 94-340 at 7, ¶ 9 (released January 4, 1995) ("Ameritech Applications") (emphasis added). The language in Ameritech Applications comes directly from the FCC's first major order in this proceeding. See Telephone Company-Cable Television Cross-Ownership Rules, 7 FCC Rcd. 5781, 5783 n.3 (1992) ("A 'basic platform' is . . . transmission service coupled with the means by which consumers can access any or all video program providers making use of the platform.").

³ Recently acted-upon applications have left open the possibility of significant bottleneck constraints on access. See, e.g., Ameritech Applications at 5-6, ¶¶ 5-7 (FCC rejects the "flexibility" of Ameritech's proposal to cope with capacity shortfalls by relying upon a "Common Channel Manager" because of Ameritech's failure to explain, among other things, how the manager would be selected).

I. THE RECORD CONTAINS NOTHING TO ALLEVIATE CONCERNS THAT VIDEO DIALTONE SYSTEMS MAY BE DESIGNED AND OPERATED IN A MANNER THAT THWARTS DEVELOPMENT OF TRUE COMPETITION AMONG MULTIPLE PROGRAM PACKAGERS ON THE SAME SYSTEM

Earlier in this proceeding, Viacom explained how the set-top box might well become "a means by which end-user subscribers" are prevented from "access[ing] any and all of the video programming offered" on a VDT network -- thereby undermining the Commission's express expectations for video common carriage service.⁴ Focusing on other potential bottlenecks, many commenters express the same fundamental concern that, without timely action by the FCC, the basic VDT platform will not fulfill its pro-competitive promise.

No commenter questions the value of the Commission's VDT policy objective of fostering a competitive market for the provision of multichannel program services. Commenters likewise generally endorse the common carrier means chosen to effectuate this goal. Yet Viacom remains concerned that the practical directives required to fully implement nondiscriminatory "open access" -- and thus to develop fair competition by and within VDT systems -- are not in place.

⁴ Ameritech Applications at 7, ¶ 9; see generally Comments of Viacom International Inc., CC Docket No. 87-266, at 3-8 (December 16, 1994) ("Viacom Comments"). The term "set-top box" should be understood here as a generic reference to any element that provides the network intelligence or is otherwise necessary to gain access through the last portal to the consumer's television receiver, whether that element resides inside or outside the consumer's home.

Neither the record in this proceeding nor the VDT application process has fully answered questions about certain barriers to competitive access that may be lurking within VDT networks' design or operation. Many comments note that firms capable of acting as gatekeepers on VDT systems have several means of controlling who may obtain access and on what terms -- such as manipulating an artificial shortfall of channel capacity or establishing a favored programmer to control use of some channels.⁵

Viacom sees a similar (albeit perhaps less readily apparent) threat that a set-top box or its functional equivalent could be used to deny programmers or packagers fully open access to a VDT system. While the cost of a set-

⁵ See, e.g., Comments of United and Central Telephone Companies, CC Docket No. 87-266, at 4-7 ("United Telephone Comments") (demand for analog capacity may never exceed supply for some VDT systems); Comments of Home Box Office, CC Docket No. 87-266, at 5-9 ("HBO Comments") (discussing tensions in treatment of analog and digital capacity) [both filed December 16, 1994]. Many commenters pointed out the competitive pitfalls that could emerge if either a local exchange carrier ("LEC") or a single favored programmer/packager were allowed to administer channel sharing. See, e.g., Comments of AT&T, CC Docket No. 87-266, at 6-7 ("AT&T Comments"); Comments of California Cable Television Association, CC Docket No. 87-266, at 4-7; Comments of Joint Cable Commenters (Adelphia Communications Corp. et al.), CC Docket No. 87-266, at 5-7 ("Joint Cable Comments"); Comments of the National Cable Television Association, CC Docket No. 87-266, at 15-18 ("NCTA Comments") (such arrangements are akin to the now-rejected proposal allotting more than half of available analog capacity to a single anchor-programmer); Comments of the Alliance for Communications Democracy, et al., CC Docket No. 87-266, at 14-15 [all filed December 16, 1994].

top box is one potential hindrance,⁶ Viacom explained that the technical design of the box also can directly facilitate anticompetitive action.⁷ Such a barrier can bestow upon a VDT operator -- or any favored program packager -- the power to effectively limit competition by handicapping rival packagers' or programmers' access to consumers through the existing set-top box.⁸

Viacom was not alone in flagging the set-top box issue as one requiring the Commission's attention. For different reasons, AT&T has suggested characterizing the set-top box as unregulated "customer premises equipment" ("CPE") but allowing the charge for the box to be included in a tariff.⁹ AT&T raises a fair issue -- and difficult questions of

⁶ See, e.g., AT&T Comments at 4-5; Comments of GTE, CC Docket No. 87-266, at 9; HBO Comments at 8-9; Comments of Southwestern Bell Corporation, CC Docket No. 87-266, at 3-4 ("Southwestern Bell Comments"); United Telephone Comments at 5; Comments of the National Association of Telecommunications Officers and Advisors, CC Docket No. 87-266, at 20; Comments of Ortel Corporation, CC Docket No. 87-266, at 3 [all filed December 16, 1994]. Cf. Comments of Pacific Telesis Group, CC Docket No. 87-266, at 2-3 (filed December 16, 1994) ("Pacific Telesis Comments") (noting that its channel sharing proposal would rely on analog channels and thus not require a set-top box).

⁷ See Viacom Comments at 4-8.

⁸ This sort of action would leave rivals in the position of attempting to convince consumers to pay even more money for a second converter box.

⁹ AT&T Comments at 5 n.2 (deployment of costly digital boxes will be expedited by permitting LEC to provide box as part of tariffed service).

regulation. Indeed, the comments of AT&T and others highlight several related matters warranting further Commission consideration (whether in this proceeding or elsewhere) of the critical role to be played by set-top boxes in the world of digital communications and technological convergence.¹⁰

Viacom and others have urged the Commission to address here both the technical and economic obstacles which might be erected around the set-top box in a VDT system. Viacom is not wedded to any particular approach to ensuring open access to the set-top box, but rather only to ensuring that the Commission's VDT policy does deliver on its promise of providing "a means by which end-user subscribers can access any and all of the video programming offered."¹¹

As to the issue of technical obstacles, Viacom supports the mandatory establishment and publication of VDT system specifications in a manner that is open and fair to all prospective users and manufacturers. By requiring that any technical specifications or parameters necessary to reach

¹⁰ See, e.g., Comments of Compaq Computer Corporation, CC Docket No. 87-266, at 3-4 (filed December 16, 1994) ("Compaq Comments"); Comments of the Consumer Electronics Group of the Electronic Industries Association, CC Docket No. 87-266, at 4 et seq. (filed December 16, 1994) ("EIA/CEG Comments").

¹¹ Ameritech Applications at 7, ¶ 9; see also 7 FCC Rcd. at 5783 n.3.

consumers be made publicly available,¹² the Commission will also foster competition among providers of set-top boxes and thus ultimately serve the public's interest in the development of truly barrier-free VDT networks.

Responding to the potential economic obstacles, meanwhile, may require solving the question of the appropriate regulatory treatment of the set-top box for VDT purposes. The Commission could find that because the set-top box is an element of the basic platform critical to providing open access over the transmission service,¹³ the box should be classified as network equipment and LECs allowed to provide the equipment under tariff. In this case, the rates for the set-top would need to be "unbundled" from any other charge, thus permitting others to compete with the VDT operator in the provision of the box. If the Commission chooses instead to treat the set-top box as CPE,¹⁴ it should still take steps to ensure that the box is technologically open to all programmers and other users.¹⁵

¹² Accord EIA/CEG Comments at 7 (citing existing CPE technical disclosure requirements).

¹³ See id.

¹⁴ Cf. Compaq Comments at 3 (unbundled competitive provision of set-top box or similar equipment can be achieved under CPE approach).

¹⁵ Historically, policymakers at times have found that regulatory action must be undertaken for a short period to allow truly competitive marketplace conditions to emerge.

(continued...)

Recent movement on pending VDT applications sharpens the need for prompt scrutiny of this matter. If video dialtone is to fulfill its mission of enhancing competition in video transmission, the FCC must ensure that the set-top box or its functional equivalent does not operate as a barrier to access. No matter how the Commission reconciles its approach to CPE here, further steps are needed to provide open, nondiscriminatory access that truly allows program providers to reach through all links to a VDT subscriber.

II. THE RECORD CONFIRMS THAT "CHANNEL SHARING" IS MERELY A NETWORK MANAGEMENT ISSUE THAT DOES NOT REQUIRE INTERFERENCE WITH THE PROGRAMMER'S RIGHT TO CONTROL THE LICENSING OF ITS PRODUCT

None of the participants in this proceeding have denied that efficient use of VDT channel capacity is a laudable goal. Given the limited scope of issues that actually must

¹⁵(...continued)

See, e.g., Interstate & Foreign Message Toll Telephone, 56 FCC 2d 593 (1975), aff'd sub nom. North Carolina Utilities Commission v. FCC, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976); Interstate & Foreign Message Toll Telephone Service, 58 FCC 2d 736 (1976), aff'd sub nom. North Carolina Utilities Commission v. FCC, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977) (FCC requires telephone companies to allow any independently manufactured terminal device meeting FCC technical standards to be connected to the telephone network); the All-Channel Television Receiver Act of 1962, codified at 47 U.S.C. § 303(s) (1994) (promoting competition by requiring that TV sets accommodate UHF, as well as VHF, channels); Establishment of Domestic Communications - Satellite Facilities by Non-Governmental Entities, 35 FCC 2d 844, 848 recon., 38 FCC 2d 665, 676-680 (1972) (imposing three-year limitation on AT&T entry into market to ensure development of competition).

be addressed to allow for efficient use of VDT capacity, however, commenters rightly have challenged the necessity or appropriateness of the more elaborate channel sharing schemes that have been put forward -- particularly those which call for a "channel manager" to play an extensive middleman role.¹⁶ Of particular interest to Viacom, several commenters agree that various channel sharing proposals critically ignore the fundamental role of programmers in controlling the licensing of their product.¹⁷

This state of confusion warrants Commission confirmation of a fundamental tenet for any solution to the efficiency problem: the programmer determines who carries its service and on what terms and conditions. Thus, programmers should be free to employ channel sharing as a means of licensing rival packagers on a VDT system. On the other hand, under any permissible channel sharing approach, programmers' right to carriage should not be conditioned upon their grant of exclusivity or sublicensing rights to any putative "channel manager."¹⁸

¹⁶ See supra note 5.

¹⁷ See Pacific Telesis Comments at 6 n.12; HBO Comments at 10-11; Joint Cable Comments at 6-7; NCTA Comments at 14-15. Cf. Comments of the National Association of Broadcasters, CC Docket No. 87-266, at 9-10 (filed December 16, 1994).

¹⁸ As Viacom has already explained, the Commission should also clarify that, as an initial matter, program
(continued...)

In fact, when viewed as a whole, the comments on channel sharing reveal that this channel-efficient use of VDT capacity requires nothing more than three basic steps. First, it is the role of the programmer to voluntarily determine whether it will authorize more than one program packager to carry its service over a given VDT system.¹⁹ Second, the licensed packager obviously must notify the VDT operator as to which services the packager is authorized to carry on that VDT system. Finally, the VDT operator needs only to serve the ministerial, nondiscretionary role of actually transmitting all program services included in a particular package to the subscribers of that package.²⁰ Channel sharing proposals characterized by embellishments beyond these three steps make no necessary contribution to VDT bandwidth efficiency, but rather depart from the VDT common carrier framework.

The channel sharing controversy should make clear that true intramodal competition on each VDT system will not come

¹⁸(...continued)

services carried on more than one package must be required to "channel share" only where there is a genuine shortage of analog capacity. Viacom Comments at 9. Even then, channel sharing must feasibly provide for such customary terms of carriage as the rights granted by a programmer to a packager to insert local commercial spots into the program material.

¹⁹ Accord, e.g., Pacific Telesis Comments at 6 n.12.

²⁰ Accord New England Cable Comments at 4 (LEC role should be confined to simply providing nondiscriminatory access).

to pass unless packagers and VDT operators are barred from imposing unreasonable terms and conditions on programmers as a predicate to carriage.²¹ The Commission would find a useful model in its rules implementing the "carriage agreement" provisions of the Cable Consumer Protection and Competition Act of 1992.²² The agency should begin, as suggested above, by preventing channel sharing from being used as a guise for demands by a favored packager for exclusivity or sublicensing rights, which are in no way necessary to effectuate efficient channel use. The FCC should also scrutinize less overt but still inappropriate conditions of carriage such as the Southwestern Bell proposal

²¹ The need for similar -- but stronger -- safeguards is even more compelling should LECs be permitted to provide video programming over their own facilities, a development which appears imminent. See, e.g., C&P Telephone v. U.S., Nos. 93-2340 and 93-2341, 1994 U.S. App. Lexis 32985 (4th Cir. 1994). Because the Commission has opened a new proceeding to address issues raised by these court decisions, Viacom will reserve for that proceeding its comments on the safeguards required in the absence of the cable/telco cross-ownership restriction.

²² See 47 U.S.C. § 536 (1994); 47 C.F.R. §§ 1300-1302 (1994). See also H.R. 3626, The Antitrust and Telecommunications Reform Act of 1994, 103rd Cong., 2d Sess. (1994) at § 401; S. 1822, The Communications Act of 1994, 103rd Cong., 2d Sess. (1994) at §§ 501-502 (proposed safeguards to ensure unaffiliated program providers nondiscriminatory carriage on systems where LEC provides own video programming).

requiring packagers and programmers to submit to "joint marketing" of program material carried on shared channels.²³

Indeed, the record is now peppered with illustrations of how far afield some channel sharing proposals have gone from the goal of avoiding unnecessary duplication of programming on "scarce" analog channels. The Commission therefore should clarify that channel sharing, when appropriately designed to serve the cause of efficiency, does not require interference with the programmer's right to control the licensing of its product.

CONCLUSION

The success of the Commission's broad vision for competitive multichannel services rests to a large degree on the practical ground rules governing VDT design and operation. Viacom, bolstered by the like concerns of other commenters, urges the Commission to safeguard the role of the set-top box or its functional equivalent as a critical link for truly open, nondiscriminatory access to VDT subscribers. Similarly, Viacom joins with many commenters in calling for Commission recognition that channel sharing arrangements need not, and should not, interfere with programmer rights in order to make efficient use of VDT capacity. The significance of these concerns, coupled with the now-

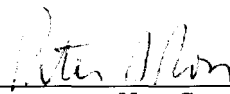
²³ Southwestern Bell Comments at 11.

expedited action on VDT applications, highlights the need for prompt Commission attention to these issues before VDT systems become fully operational.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rosemary C. Harold, certify that the original and five copies of the foregoing "REPLY COMMENTS OF VIACOM INTERNATIONAL INC." were served via hand-delivery on this 17th day of January, 1995, to the following:

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